MALAYAN BANKING BHD

v.

ZAINON ISMAIL

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: 24-251-2000]
24 MARCH 2001

CIVIL PROCEDURE: *Action - Dismissal of action - Delay in bringing action - Whether delay of ten years amounted to protracted period of uncertainty - Whether delay a mere irregularity*

CIVIL PROCEDURE: *Action - Dismissal of action - Delay in bringing action - Whether notice of intention to proceed to be given - Rules of the High Court 1980, O. 3 r. 6*

LAND LAW: *Land Administrator - Rights, powers and jurisdiction - Reference of matter to High Court - Whether Rules of the High Court 1980 to apply - National Land Code 1965, s. 419(2)*

The plaintiff is a financial institution while the defendant is the registered owner of two pieces of land ('the property'). On 7 July 1985 a third-party legal charge was created by the defendant over the property for a loan facility of RM200,000 granted by the plaintiff to a company registered as Rampai Muda Development Sdn Bhd. The borrowers defaulted in the repayment of the loan and on 1 January 1989 the plaintiff commenced foreclosure proceedings against the defendant by issuing a notice under s. 254 of the National Land Code 1965 ('NLC'), demanding that the defendant pay the amount owing within one month as stipulated in the notice. The defendant failed to comply with the demand and the plaintiff applied for an order for sale from the land administrator pursuant to s. 260 of the NLC. The property was put up for auction but failed to attract any bids. The land administrator then referred the matter to the High Court under s. 265(3)(b) of the NLC.

There was a gap of nearly ten years before the plaintiff decided to proceed with the case against the defendant. Finally on 23 September 2000, the plaintiff filed an originating summons in the High court for an order to put the land up for sale.

Held:

[1a] Under s. 21(1) of the Limitation Act 1953 ('LA'), time actually runs from the date the right to receive money accrues, namely when the defendant defaulted in her obligation to make payment after being served with a Form 16E notice.

[1b] In the instant case however, the plaintiff was clearly not caught by s. 21(1) of the LA as it managed to bring the action against the defendant well within the 12-year period.

[2a] Section 419(2) of the NLC which refers to "reference" is wide enough to cover the situation envisaged by s. 265(3) of the NLC. The phrase "the provisions of any written law relating to civil procedure" in s. 419(2) of the NLC must include the Rules of the High Court 1980 ('RHC').

[2b] Order 3 r. 6 of the RHC states that "where a year or more has elapsed since the last proceedings in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed."

[2c] The plaintiff therefore should have given the defendant one month's notice before undertaking any further action against the defendant, after leaving the case idle far beyond the one-year period.

[3a] The plaintiff also delayed in bringing the action to the High Court. That had not only placed the defendant in a long protracted period of uncertainty, but had also gravely burdened him in having to deal with unfinished lawsuit.

[3b] The issue of delay could not be dismissed as a mere irregularity since there was an absence of any good explanation for the long delay.

[Plaintiff's originating summons dismissed.]

Case(s) referred to:
China Insurance Co Ltd v. Yeong Ah Lan & Anor [1973] 2 MLJ 185 ***(foll)***
Collector of Land Revenue, Kota Bharu v. Yusoff Yunus [1977] 2 MLJ 53 ***(refd)***
Deighton v. Cockle [1921] 1 KB 206 ***(refd)***
Krakauer v. Katz [1954] 1 All ER 244 ***(foll)***
Perwira Affin Bank Bhd v. Lim Weow [1998] 4 CLJ 17 ***(foll)***

Legislation referred to:
Interpretations Act 1948 & 1967, s. 54(2)
Limitation Act 1953, s. 21(1)
National Land Code 1965, ss. 5, 254(3)(b), 260, 265(3)(b), 419(2)
Rules of the High Court 1980, O. 3 r. 6

Other source(s) referred to:
Annotated Statutes of Malaysia, pp 34-36

For the plaintiff - Ting Hun Yin; M/s Lua & Mansor

Reported by Mariette Peters-Goh

JUDGMENT

Suriyadi Halim Omar J:

The defendant is the registered owner of two pieces of land held under GM 1953 Lot 2868, and GM 1954 Lot 2869, of Mukim Tenus, Daerah Gunung Timur, Jajahan Bachok, Kelantan (hereinafter referred to as "the property"). The plaintiff is a financial institution. On 7 July 1985 a third party legal charge over the property was created by the defendant, in favour of the plaintiff as security for a loan facility of RM200,000 granted by the latter, to a company registered as Rampai Muda Development Sdn Bhd.

The borrowers defaulted in the repayment of the loan, and on 1 January 1989, the plaintiff as chargee through their counsel, had exercised their statutory right by commencing foreclosure proceedings against the defendant by issuing a notice under s. 254 of the National Land Code 1965 (hereinafter called "the Act"). The plaintiff demanded that the defendant pay the amount owing within one month, as stipulated in the notice. The defendant however had failed to comply with the demand, and consequently the plaintiff taking advantage of s. 254(3)(b) of the Act, had applied for an order of sale from the Land Administrator pursuant to s. 260.

The property was put up for auction on two occasions in the Land Office, but had failed to attract any bids. Pursuant to s. 265(3)(b), the Land Administrator of the Land Office accordingly had the matter referred to the High Court. On 10 October 1990 the Land Office had produced a certificate of reference, indicating that the matter was already settled at that office, and for the plaintiff to take the matter up to the High Court. The plaintiff however, took its time in filing the case at the High Court. In fact, there was a gap of nearly ten years before it decided to proceed with it against the defendant. Finally on 23 September 2000 the plaintiff filed an originating summons in the High Court for an order to put the land up for sale. On the day of the hearing, I had dismissed the originating summons with costs.

As I perceived it, I had to decide whether the originating summons filed by the plaintiff in the High Court, ten years after the issue of the certificate of reference from the Land Office, had caused the plaintiff's action to be statute barred, ie, caught by any limitation period and their restrictions (see s. 21(1)

of the Limitation Act 1953 where the period of 12 years is the cut off point), or whether there was a need for any notice to be given to the defendant. In the case of *Perwira Affin Bank Berhad v. Lim Weow @ Lim Neu* [1998] 3 AMR 2204, a Court of Appeal's decision, at held 2(b) is authored:

> Furthermore, under s. 21(1) of the Act, time actually runs from the date the right to receive money accrued namely when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice on November 2, 1979. The respondent had one month within which to make payment ie, December 2, 1979; therefore, the twelve year limitation period expired on December 1, 1991.

In the current case however, the plaintiff was clearly not caught by s. 21(1) of the Act, as it had managed to bring the action against the defendant well within the 12 years period. That being so the Limitation Act is certainly not applicable in this case, hence my lack of concern regarding the limitation period. What really attracted my attention was that the plaintiff not only had procrastinated in filing this matter in the High Court, but had also failed to issue any notice of intention to proceed to the defendant, despite the ten year long delay.

Procedurally, there is no provision that governs the practice of issuing the certificate of reference, by the Land Administrator, an administrative act that is routinely done at the Land Office. As regards the procedure for sale by the Land Administrator, s. 265 takes prominence. Bearing in mind the nature of the legal problem, I would like to confine my arguments only within the boundaries of s. 265(3)(b) of the Act. This sub-provision provides:

> If at the subsequent sale no bid is received at or above the reserve price:
>
> a) ...
>
> b) the Land Administrator shall refer the matter to the court; and
>
> c) the court may substitute for the order of the Land Administrator an order for sale under section 256, or make such other order as it may think just.

The sub-provision above, only prescribes that 'the matter' be referred to the court (interpreted as the High Court as per s. 5 of the Act), if the Land Office has received no bid on the charged property. It is absolutely inadequate about the procedures and processes, and thus leaving the interested party in total darkness as to the procedure he ought to adopt. The decision in the case of *The Collector Of Land Revenue, Kota Bharu v. Yusoff bin Yunus* [1977] 2 MLJ 53, in some small way is of assistance, as Mohamed Zahir J (as he then was), had occasion to state:

> I am therefore of the opinion that in matters of this nature it will be sufficient for the collector to issue a certificate to be called Certificate of Reference under s. 265(3)(b) addressed to the court if requested by the chargee and deliver it to the chargee. Such certificate should contain the particulars of sale of the land concerned and the reasons for the sale not being successful ...

Unfortunately, the above case is silent as to the time limit considered reasonable or fixed, for the chargee to file the matter in the High Court, pursuant to such certificate. I certainly have failed to identify any specific provision in the National Land Code too, or case law for that matter, which could provide an answer.

Therefore, under the circumstances I was forced to allude to other connected provisions or statutes in order to resolve the matter at hand. A provision that came to mind and highly relevant to circumvent the dearth of any specific provision in the National Land Code is s. 419 of the National Land Code. It reads:

> 419. Power of Registrar and Land Administrator to refer to the Court.
>
> (1) The Registrar and, subject to sub-section (3) any Land Administrator may, if he considers it necessary or desirable to do so, refer to the Court any question arising in the exercise or performance of any power of duty conferred or imposed on him by or under this Act.
>
> (2) Any such reference shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall on any such reference either determine the question in issue or make such other order as it may consider appropriate in the particular circumstances of the case.

Section 419(2) of the Act which speaks of "reference", certainly has enough depth to cover the scenario envisaged by the above s. 265(3) of the same Act. The latter also provides that, but within the circumstances promulgated in s. 265, the Land Administrator shall refer to the High Court any question arising in the exercise or performance of any power of duty imposed on him. Having perused all the above provisions, I did not hesitate in concluding that the above phrase "the provisions of any written law relating to civil procedure" in s. 419(2), must include the Rules of the High Court 1980. That being so, O. 3 r. 6 of the Rules of the High Court 1980 must take prominence in this discussion. It reads:

> Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.

(Whether by coincidence or design, the above provision explicitly resorts to the word "matter", which happens to be similar with that of s. 265(3)(b), which, to reiterate, reads "the Land Administrator shall refer the **matter** to the court").

To illustrate the importance of the one month's notice, as demanded by the Rules of the High Court 1980, I now advert to the case of *China Insurance Co Ltd v. Yeong Ah Lan & Anor* [1973] 2 MLJ 185, where Syed Othman J had occasion to state:

> ... but the plaintiff did not give the one month's notice before issuing the notice of trial. No reason has been given as to why the one month's notice could not have been given before the notice of trial was issued. Mr Wilson himself has agreed that the notice should have been given. I set aside the notice of trial.

A poser, which also had to be resolved, was whether a final judgment had been obtained in this case. If one had been obtained, then it would have been untenable for me to invoke the provision of O. 3 r. 6 of the Rules of the High Court 1980. I had to eliminate this last possible legal stumbling block as the *Annotated Statutes of Malaysia*, pertaining this provision, at p. 34-36 had this to comment:

> "Proceeding" indicates a step 'towards' judgment and the rule therefore applies only when judgment has not been entered up; where judgment has been entered up within the year, no notice need be given under this rule before execution issues on the judgment: *Taylor v. Roe* [1893] 68 LT 253; *Houlston v. Woodall* [1884] 78 LT 113.

Having considered all the salient facts I was fully satisfied that this was not the case here. In fact, as far as the proceedings in the High Court were concerned, not much progress had been made. To put it succinctly we were still at the infant stage of the case, thus enabling me to advert to this sub-provision for assistance (*Deighton v. Cockle* [1921] 1 KB 206).

To wind-up this point, the plaintiff here thus should have given the defendant one month's notice, before undertaking any further action against the defendant, after leaving the case idle far beyond the one year period. Here it lay idle for a period of nearly ten years. By failing to do so, the plaintiff had miserably failed to comply with the above legal requirements, a failure that could not be swept aside by me.

Apart from the failure to give the one-month's notice, there was also the nagging question of the delay on the plaintiff's part, in bringing the action to the High Court. That fact of procrastination of ten years, not only had placed the defendant in a long protracted period of uncertainty, but had also gravely

burdened him in having to deal with an unfinished lawsuit. As I could not view such deliberate delay by the plaintiff lightly, a stringent approach in dealing with the matter at hand was necessary. In *Krakauer v. Katz* [1954] 1 All ER 244, it was held that in view of the failure to take any steps for twelve years, the plaintiff ought not to be allowed to proceed with the action. Denning LJ there had occasion to remark:

> I am disposed to agree that, by analogy with the Limitation Act, 1939, if a plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why he should be allowed to go on with it.

By analogy I could not simply dismiss the issue of delay as a mere irregularity as it was easily rectifiable, let alone it being unreasonably long. Even though mindful that the current case was not pursuant to an application to dismiss the originating summons for want of prosecution, the reasoning of Lord Denning was highly enlightening, and thus useful. Trudging along I also found that there was an absence of any good explanation for the long delay supplied by the plaintiff. One last point I had to ponder was that, even though the abovementioned s. 419 did not prescribe any time frame to bring the matter to the High Court, the plaintiff on the other hand could not brush aside s. 54(2) of Interpretation Act 1948 and 1967. It provides:

> Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed ...

The plaintiff in this case could not be said to have acted with all convenient speed.

Based on all the above reasons I had no hesitation in dismissing the matter with costs.